

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**VICTOR L. JELLISON**

Claimant

VS.

**KIOWA COUNTY**

Respondent

AND

**EMC INSURANCE COMPANY**

Insurance Carrier

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Docket No. 219,964

**ORDER**

Both respondent and claimant appealed Assistant Director David A. Shufelt's October 16, 1998, Award. The Appeals Board heard oral argument by telephone conference on May 5, 1999.

**APPEARANCES**

Claimant appeared by his attorney, Robert A. Anderson of Ellinwood, Kansas. Respondent and its insurance carrier appeared by their attorney, James M. McVay of Great Bend, Kansas.

**RECORD AND STIPULATIONS**

The Appeals Board has considered the record and has adopted the stipulations listed in the Award.

**ISSUES**

The Assistant Director awarded claimant a 20 percent permanent partial general disability for the May 17, 1996, work-related injury to his low back. The permanent partial general disability award was based on claimant's permanent impairment of function and not a work disability. The claimant, for the first time in his submission letter, argued for a work disability for a period after claimant's second surgery and until he was returned to work for the respondent. But the Assistant Director denied the request, finding the

claimant's submission letter was not evidence and the record was devoid of any evidence to support a work disability finding. Before the Appeals Board, the claimant neither requested nor raised the issue of work disability and, therefore, it will not be addressed on appeal.

Respondent does not dispute that claimant injured his low back at work on May 17, 1996. As a result of this work-related accident, respondent voluntarily provided claimant with medical treatment which included surgery. But, after claimant had met maximum medical improvement, had been rated by the treating physician, and had been released with restrictions to return to work, claimant again had low-back and radicular symptoms that required a second surgery. The Assistant Director found claimant's recurring low-back and radicular symptoms that required a second surgery were the natural and probable consequence of the May 17, 1996, work-related accident. The Assistant Director awarded a 20 percent permanent partial general disability with 10 percent following the first surgery and 10 percent following the second surgery. Respondent argues that the reason claimant had reoccurring low-back and radicular pain was not the consequence of the original work-related injury but was the direct result of a separate noncompensable accident that occurred while claimant was lifting his grandson at home.

Conversely, claimant requests the Appeals Board to affirm the Assistant Director's Award. In addition, claimant argues he is entitled to interest for 10 percent of the 20 percent of the permanent partial general disability award pursuant to K.S.A. 44-512b. Claimant contends there was no just cause or excuse for the respondent not to pay the 10 percent permanent partial general disability that claimant suffered after the first surgery.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board makes the following findings and conclusions:

##### **Findings of Fact**

(1) On May 17, 1996, claimant injured his low back when he was in an awkward stooped position while washing a truck at work with a washing wand. Claimant immediately had pain in the low back that radiated down his left leg.

(2) Respondent provided medical treatment for claimant's low-back injury through orthopedic surgeon Guillermo Garcia, M.D. After an MRI examination, Dr. Garcia diagnosed claimant with a herniated disc on the left at L5-S1. On July 22, 1996, Dr. Garcia performed a lumbar laminectomy and disc excision at L5-S1. Post-surgery, claimant was placed in a physical therapy program, and he eventually completed a work hardening program.

(3) Claimant made good progress and was symptom free until he changed a tire on his truck in October of 1996. During a regular follow-up visit with Dr. Garcia on October 28, 1996, claimant complained of low-back pain and stiffness from changing the tire. Dr. Garcia examined claimant and found claimant had scoliosis and significant tightness in the lumbar spine. But claimant did not have any pain radiating into his lower extremities.

(4) Dr. Garcia again saw claimant on November 4, 1996. At that time, claimant had improved. His straight leg raises were negative. Dr. Garcia found claimant had met maximum medical improvement and rated claimant with a 10 percent whole body functional impairment. Claimant had completed a functional capacity evaluation (FCE) on October 24, 1996, before the tire changing incident, and Dr. Garcia released claimant for work with permanent restrictions based on the FCE.

(5) For reasons not fully explained in the record, respondent did not return claimant to work at that time.

(6) Claimant's low back remained asymptomatic until December 27, 1996. On that date, claimant was on the floor at home and lifted his 23-pound grandson so he could console him because he was upset. He didn't feel any symptoms at the time but claimant testified the next morning he had so much pain and discomfort he could hardly get out of bed.

(7) Because of this pain and discomfort, claimant went to his family physician, William Eugene Cannata, M.D., on December 30, 1996. The history claimant gave Dr. Cannata was that he lifted his 23-pound grandson and later that evening he felt an achy sensation in his back. He also told Dr. Cannata that he could hardly get out of bed the next morning.

(8) Dr. Cannata found claimant had pain across the low back that radiated down his left leg. Claimant was in moderate distress. Claimant also had some left paraspinal spasms in the lumbar area. Straight leg raises caused pain in claimant's back and down the left posterior thigh.

(9) Dr. Cannata referred claimant back to Dr. Garcia for further examination and treatment. Dr. Garcia saw claimant on January 23, 1997. But claimant did not give Dr. Garcia a history of lifting his grandson on December 27, 1996, and then later in the evening feeling low-back pain. Claimant told Dr. Garcia he was not doing any particular lifting or twisting but sometime on a Friday in December he felt his back had somehow caught up and he started having low-back pain with radiation down the left leg. On examination, Dr. Garcia found claimant to have straight leg raises slightly positive on the left. Dr. Cannata had previously ordered an MRI examination on January 21, 1997, that showed some scarring on the nerve root, left side, but no true herniated disc or any migrated fragment. Dr. Garcia took claimant off work and placed him in a physical therapy program and prescribed an epidural block.

(10) Dr. Garcia, in March of 1997, referred claimant for a neurological evaluation with neurosurgeon Paul S. Stein, M.D. Dr. Stein recommended claimant undergo a myelogram and post-myelogram CT scan to rule out the possibility of a recurrent disc herniation. On April 9, 1997, claimant had the myelogram and post-myelogram CT scan. This showed claimant to have scarring around the nerve root and the nerve root appeared elevated. Dr. Garcia opined that the elevation could be caused by a migrated fragment at the same L5-S1 previous surgical site.

(11) Because claimant did not improve with the conservative treatment regiment, Dr. Garcia, on August 11, 1997, performed a laminectomy, decompression of the nerve root, and spinal fusion at L5-S1. Before the second surgery, Dr. Garcia believed claimant's increased low-back pain and radiating pain down his left leg were caused by the scarring around the nerve root that was related to the first surgery.

(12) Dr. Garcia testified, after the second surgery, that the first injury and surgery made claimant more pre-disposed or susceptible to the scarring and the herniation of the small fragment from the same disc space. The doctor was asked, "Can that small fragment be brought about by another lifting event, such as lifting 23 pounds?" He replied, "It could be brought about coughing, bending over, lifting up something, yes." As previously noted, the claimant failed to give Dr. Garcia a history that his low-back and left leg pain started after he picked up his grandson. During Dr. Garcia's deposition, the respondent provided the doctor that particular history. Dr. Garcia then replied, "If, indeed, there is an incident (picking up the grandson) which is followed by a clinical finding of radicular pain, weakness, . . . it's very likely at that time there was an irritation of the nerve root." Dr. Garcia also was asked, ". . . in this situation, regardless if it was coughing, sneezing, lifting his grandchild, bending over, whatever caused the recurrent disc, is it your opinion that this is a natural and probable consequence of his original injury and surgery that caused this?" The doctor answered, "Yes." But the doctor was again asked, given the history of claimant lifting his 23-pound grandson and then experiencing pain in his lower back and radiating pain down his leg, "you cannot say with a reasonable degree of medical probability that had he not lifted that boy that he would have had those symptoms, could you?" Dr. Garcia answered, "No."

(13) Dr. Garcia opined that claimant sustained a 10 percent permanent impairment of function as a result of the May 17, 1996, work-related injury and surgery. Likewise, the doctor opined claimant sustained an additional 10 percent permanent impairment of function after the second surgery for a total of 20 percent. In arriving at those two function impairment ratings, Dr. Garcia testified he utilized the American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (Revised).

(14) Respondent employed orthopedist C. Reiff Brown, M.D., to examine and evaluate claimant. Dr. Brown saw claimant once on June 18, 1998. He had claimant's previous medical treatment records to review that included MRI examination reports.

(15) Claimant gave Dr. Brown a history of lifting his grandson and after that incident, he experienced low-back and radiating pain down his left leg similar to the pain he had before the first surgery.

(16) Dr. Brown was asked, if there was a relationship between claimant lifting his grandson and the recurrence of the significantly acute back pain and radiculopathy. The doctor answered, "something occurred with that lifting incident . . . that provoked the recurrence." Dr. Brown went on to testify that if the scar tissue was the cause of the recurrent back and leg pain there would have been a gradual recurrence. But claimant's pain came on suddenly after lifting his grandson. The doctor was then asked, if he would agree that the lifting incident by history caused the additional herniation and in conjunction with the scar tissue caused the radiculopathy. The doctor answered, "I think that has to be accepted, yes."

(17) Dr. Brown also agreed that claimant's first surgery made him more susceptible to having the scarring and the recurrent disc herniation. He was then asked, "So it's a natural and probable consequence of surgery when somebody has this failure?" The doctor replied, "I would agree."

(18) Dr. Brown utilized the AMA Guides, Fourth Edition, to determine that claimant suffered a 10 percent whole body impairment as a result of the May 17, 1996, work-related accident. Dr. Brown opined the 10 percent was included in the AMA Guides, Fourth Edition, DRE Lumbosacral Category III. Dr. Brown disagreed with Dr. Garcia's 20 percent impairment of function rating. He testified that based on the AMA Guides, Fourth Edition, claimant would have had a 10 percent impairment of function after his first surgery and the second surgery would not have increased the claimant's functional impairment.<sup>1</sup>

### **Conclusions of Law**

(1) Every natural consequence of a compensable injury is also compensable even a new and distinct injury, if it is a direct and natural result of the original compensable injury. See Jackson v. Stevens Well Service, 208 Kan. 637, 493 P.2d 264 (1972); Reese v. Gas Engineering & Construction Co., 219 Kan. 536, 548 P.2d 746 (1976).

(2) But if the subsequent reinjury of a compensable injury results form a new and separate accident, the resulting injury is not compensable. See Stockman v. Goodyear Tire & Rubber Company, 211 Kan. 260, 505 P.2d 697 (1973). In Stockman, after claimant had been released and recovered from a work-related back injury, he reinjured his back while he was not at work when he tossed a tire in the trunk of a car. The court held this was not a compensable result of the first injury and distinguished the early cases on the

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<sup>1</sup>K.S.A. 1996 Supp. 44-510e, required the AMA Guides, Fourth Edition to be used in determining functional impairment ratings for accidents occurring after April 4, 1996, the effective date of the amendment.

grounds that they involve gradual increases in disability from the original injury. See also Graber v. Crossroads Cooperative Ass'n, 7 Kan. App. 2d 726, 648 P.2d 265, rev. denied 231 Kan. 800 (1982), where the claimant first suffered a compensable injury to his back and then reinjured his back when he slipped. In explaining why the second injury was not a consequence of the first, the court noted that the slip was a trauma-inducing event out of the ordinary pattern of life.

(3) But in Gillig v. Cities Service Gas Co., 222 Kan. 369, 372, 564 P.2d 548 (1977), the Kansas Supreme Court affirmed an award for a knee injury that the claimant had aggravated when he stepped from a tractor when not working for the respondent and again while watching television at home. The aggravation was not gradual.

(4) The test remains one of determining whether the new injury is a "direct and natural result of the primary injury" or is it the result of a "new and separate accident". The former is a compensable consequence of the first injury and the second is not. These cases suggest that a separate accident can logically be defined as an accident involving independent trauma, i.e., trauma independent from the original injury as a cause of the new injury. In the Stockman case, for example, claimant tossed a tire into the trunk of a car. In contrast, the Gillig case involves a claimant who merely stepped down from his tractor. There was no separate trauma apart from the ordinary use of the leg. Injury from the knee giving away was treated as a compensable consequence of the original injury. Also significant in the Gillig case was the fact that the original injury remained symptomatic and had not healed.

(5) The Appeals Board concludes the record as a whole proves that the incident of claimant lifting his grandson at home was a new and separate accident that resulted in claimant having recurrent pain in the low back and radiation down the left leg. Before that incident, claimant had recovered from his work-related low-back injury and subsequent surgery. Dr. Garcia had released claimant on November 4, 1996, finding that claimant had met maximum medical improvement. At the time of claimant's release, he had no radicular pain and clinically his straight leg raises were negative. But following the lifting incident at home, claimant had acute pain in his low back that radiated down his left leg. His treating physicians then found claimant with positive straight leg raises. Both Dr. Garcia and Dr. Brown agreed that the lifting incident could have caused the migrating fragment found during the second surgery at the same disc space. If the scar tissue had been the cause of claimant's new symptoms, these symptoms would have come on gradually and not as a sudden onset as experienced by claimant after the lifting incident.

The Appeals Board is mindful that because of the May 17, 1996, work-related accident and surgery, claimant was more susceptible to experience a herniated disc. But in this case, claimant had made a good recovery after the first surgery. Therefore, the Appeals Board finds claimant did not experience and probably would not have experienced the recurring herniated disc except for the lifting incident. Since the pain did not come on gradually, but was experienced shortly after the lifting incident, the Appeals Board

concludes the pain was caused by the migrating fragment resulting from the lifting incident and not from the scarring that was caused by the first surgery.

(6) The Appeals Board, therefore, concludes claimant is not entitled to workers compensation benefits for the separate accident that occurred while claimant was lifting his grandson at home on or about December 27, 1996. The Assistant Director's Award should be and is modified to award permanent partial general disability benefits of 10 percent based on Dr. Brown's 10 percent impairment of function opinion as determined by utilizing the AMA Guides, Fourth Edition.

(7) Respondent is ordered to pay all reasonable authorized medical expenses for medical treatment of claimant's May 17, 1996, low-back injury up through claimant's release by Dr. Garcia on November 4, 1996.

(8) Claimant is also entitled to unauthorized medical expenses up to the statutory limit upon proper presentation of the statement.

(9) The Appeals Board affirms the Assistant Director's finding that claimant is not entitled to interest pursuant to K.S.A. 44-512b. The Appeals Board finds that the specific amount of claimant's permanent partial general disability remained in question until the Appeals Board's Order. Therefore, the Appeals Board finds, since the amount of claimant's permanent partial general disability award was in question, interest pursuant to K.S.A. 44-512b is denied.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that Assistant Director David A. Shufelt's October 16, 1998, Award, should be, and is hereby modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Victor L. Jellison, and against the respondent, Kiowa County, and its insurance carrier, EMC Insurance Company, for an accidental injury which occurred on May 17, 1996, and based upon an average weekly wage of \$436.10.

Claimant is entitled to 35.71 weeks of temporary total disability compensation at the rate of \$290.75 per week or \$10,382.68, followed by 39.43 weeks of permanent partial general disability compensation at the rate of \$290.75 per week or \$11,464.27 for a 10% permanent partial general disability, making a total award of \$21,846.95, which is all due and owing and is ordered paid in one lump sum, less any amounts previously paid.

All other orders contained in the Award are adopted by the Appeals Board that are not inconsistent with this Order.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 1999.

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BOARD MEMBER

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BOARD MEMBER

**DISSENT**

I strongly disagree with the majority's analysis of the evidence. The medical evidence is overwhelming that Mr. Jellison's second surgery and the symptoms leading up to that surgery were the natural and direct result of his May 1996 accident. In light of the medical evidence, the majority takes a giant leap to conclude that Mr. Jellison injured his back lifting his 23-pound grandchild.

The Award entered by the Assistant Director should be affirmed.

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BOARD MEMBER

c: Robert A. Anderson, Ellinwood, KS  
James M. McVay, Great Bend, KS  
David S. Shufelt, Assistant Director  
Pamela J. Fuller, Administrative Law Judge  
Philip S. Harness, Director